

Law or Justice: Building Equitable Legal Institutions

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Introduction

It is now widely accepted that the ‘rule of law’ is key to sustainable development. The different legal or rule-based systems in any given society underpin the institutions that govern both market and non-market interactions; they determine the distribution of economic, social and political rights and obligations affecting both economic and non-economic relationships. They shape the regulation of market practices and the delivery of public services., and hence the opportunities people have to take part in economic activity and generate fair returns.¹ Legal institutions also provide mechanisms to mediate conflict resolve disputes and sustain peace and order.

The belief in the importance of legal institutions is reflected in the emergence of Justice Sector Reform (JSR) as a central concern for many development agencies. In the past fifteen years, the World Bank has financed hundreds of legal and judicial reform initiatives and numerous stand alone projects, and has recently committed to scaling up these efforts. Other bi-lateral development agencies and multi-lateral donors have committed hundreds of millions of dollars to reforming judicial systems, with the majority of developing countries and former socialist states now receiving assistance for some kind of justice sector reform.²

Unfortunately, what is less clear in current development thinking is how a ‘rule of law system’ is fostered or achieved and what this means for Justice Sector reform initiatives; a belief in the need for ‘the rule of law’ tells us little about what the rule of law actually means, how it manifests itself or how a given society can achieve it. Despite concerted efforts, over a decade of projects have reported limited success and brought current approaches into question.³ As a result, the Legal and Judicial Reform movement, as with the previous law and development movement of the 1960’s, has been criticized for lacking any clear conceptual framework or theory of law. This paper argues that while this may be true in terms of an in-depth understanding of how legal systems develop over

¹ For different discussions on the link between weak institutions and economic development see the World Bank’s website on anti-corruption and public sector management at <http://www1.worldbank.org/publicsector/anticorrupt/index.cfm>; Glaeser, Scheinkman, and Shleifer (2002); Haber (2001).

² Messick (1999).

³ For examples of surveys and evaluations of recent justice sector reform projects arguably bringing current approaches to legal and judicial reform into question see Faundez (1997); Gardner (1980); Gupta, Kleinfeld and Salinas (2002); Hambergren (1998); Lawyers Committee for Human Rights (1996); Rose (1998); US Agency for International Development (1994). See also Chopra and Hohe (2004).

time or how they actually function, in fact one of the main problems with the movement is its underlying assumptions about what the rule of law is and what it looks like.

In this paper we will briefly examine the way the relationship between law and development is currently conceptualized in development circles, and in particular how Justice Sector Reform has been pursued as a consequence. By analyzing the extent of some of the problems with the Justice Sector in many developing countries, the paper aims to shed some light on the question of why JSR efforts have had limited impacts- do current approaches to reform speak to the realities in many contexts? Ultimately it argues that much of the problem lies in the institutional myths surrounding the ‘rule of law’ model and hence the underlying assumptions that are embodied in these reform policies.⁴

What do Justice Sector Reform Initiatives tell us about understandings of ‘the rule of law’?

Examining current approaches to JSR raises two main overarching concerns. First is the conceptualization and relegation of legal and regulatory issues to a sector. Given that effective legal and normative frameworks are a prerequisite for good institutions, one would think that the ‘laws and rules’ underpinning a particular policy reform would be a key element of all development projects; that legal considerations would be taken into account in the same way economic ones are currently in most policy designs. Wrong. While most economists and other development practitioners arguably recognize the importance of law, they tend to take it for granted, ignore it or focus on isolated laws taken out of their institutional context. Those who do focus on the role of the legal system have tended to narrow their focus to the institutions that make up the justice sector.

Relegating the legal system to the Justice Sector has two main consequences. On the one hand it means that inadequate or outdated legal and normative frameworks may undermine broader policy reforms. On the other, it often means that reforms of the justice sector are abstracted from the broader frameworks of political governance and social norms that are key to its functioning. This is not to say that the actual justice sector is not a central part of the overall institutional framework of a given society, or to deny that it plays an important role in designing, maintaining and enforcing the different rights and responsibilities necessary for other institutions to effectively function, however, the justice sector in turn relies on normative and political institutions for its legitimacy, authority and accountability.

The abstraction of the justice sector from broader normative and governance frameworks relates directly to the second concern, that JSR initiatives are predominantly based on a pre-determined ideal that is articulated in terms of its *form*, rather than being based on an understanding of the socio-economic and political *functions* it plays in any given society. This approach reflects a theoretical model that starts with a perfect ‘rule of law’ system, from which dysfunctional systems have deviated.⁵

⁴ Pritchett and Woolcock (2004).

⁵ This argument draws on Raghuram Rajan’s critique of orthodox economic models. See Rajan (2004).

Rajan (2004) explores the reasons why such theoretical models of perfect systems are considered useful starting points in his discussion of orthodox economic models. He argues that they are considered reasonable approximations of reality, which give practitioners a useful common point of departure and a shared language and understanding within particular disciplinary circles. Further, such models give us a basis for empirical work, giving us categories, theorems and proofs that can be measured or tested. Rajan, however, argues that the complete market model used by many economists is too far distanced from reality to be useful.⁶ He argues that relying on orthodox economic models makes solutions to development problems seem far simpler than they actually are; particular problems are addressed as if they occur in a world where everything else works. Ultimately he argues that perhaps we would be better served by starting with an assumption that nothing works:

*(For example) Instead of analyzing the effects of introducing contracts in a world where everything else works, a better approach might be to investigate the effects of introducing a legitimate contract in a world where nothing works. Our analysis would be better informed by assuming anarchy as a starting point rather than a pristine world of complete contracts.*⁷

Starting with a model of a perfect ‘rule of law’ system, from which countries deviate, has shaped current approaches to Justice Sector Reform; it helps support a technocratic approach to reform, whereby technical experts try to replicate or import the laws and legal institutions of developed countries in the developing context. As with the approaches to economic reforms that Rajan describes, it makes solutions seem easier than they are and leads to compartmentalized reforms that assume- and in fact often require- that the broader system works. The problem is, not only does the broader system not work in many contexts - it often doesn’t even exist.

In the next sections, we explore some of the main pathologies—often interrelated and reinforcing—that plague justice systems in many developing contexts. First, Justice sector institutions may be a product of elite interests, or alternatively may be open to capture by such interests. As a result legal institutions may directly discriminate against certain groups or may fail to protect the rights of excluded or minority groups. Second, even if people’s rights are not actively undermined, the institutions charged with protecting them are often inaccessible, due to the limited capacity of the institutions, people’s lack of knowledge of the system, or the fact that they are incompatible with norm-based institutions that continue to govern everyday life. In the final, section we reflect on the consequences these pathologies have for approaches to JSR and what, therefore, they might tell us about ways forward in this area.

⁶ Rajan (2004),56.

⁷ *Id.*, 57.

The Creation and Subversion of Justice Sector Institutions: Capture and Corruption

Structures of inequality affect both the creation of justice sector institutions and the context within which they operate; they are embedded in the rules, practice and norms that perpetuate these institutions. Legal and regulatory institutions, in turn, affect the distribution of opportunities and the processes by which these opportunities can be leveraged to enhance well-being.

Within an idealized ‘rule of law’ system, equitable legal and regulatory institutions operate as safeguards against abuses of state and non-state power while well-functioning regulatory frameworks are crucial for the effective delivery of public services. A ‘rule of law’ system is generally characterized by multiple arms of government - the executive, legislature and judiciary - with each branch holding the others accountable through differing ‘checks and balances’. The separation of powers principle aims to combat the dangers of investing state power in one person or group.⁸ The judicial branch, in particular, exists to protect citizens against the arbitrary or inequitable use of political or economic power. Further, predictable and fair ‘rules of the game’ and secure legal rights are seen as the basis for an effectively functioning society. Arguably, the *raison d'être* of these institutions is to further the common good by exercising power based on a sound balance between collective and individual interests.

Unfortunately, this ideal bears little resemblance to reality in many countries around the world. In some countries, justice sector institutions by their very design perpetuate elite interests at the expense of the majority of the population. In many other countries, formal rules which seemingly protect the interests of the broader community are undermined by institutional practices and informal strategies. Whether understood as elite capture⁹ or corruption¹⁰, these systems and practices serve to increase the power and wealth of a few

⁸ This system of checks and balances is also seen by some as maintaining competition within political institutions, which establishes mechanisms for vetoes on power and sanctions for the misuse of power. See Haber (2001) for example.

⁹ Generally speaking, capture means that the equitable operation of legal, political and regulatory institutions is subverted by the wealthy and the politically powerful for their own benefit. This reference to the subversion of public sector institutions has led some people to refer to this phenomenon as ‘state capture’. Others use the term ‘elite capture’. Elite in this context means any economic, political, ethnic, social or other group trying to promote their interests at the expense of the interests of non-elite members. In the context of this paper, the terms ‘state capture’ and ‘elite capture’ will be used as synonyms. See Glaeser, Scheinkman, & Shleifer (2002) and Hellman & Kaufmann (2002) for a more detailed discussion of elite capture.

¹⁰ The definitions of corruption are as diverse as the forms corruption can take. For the purposes of this paper, we will understand corruption as the abuse of public power or public office for private gain, taken from You & Khagram (2005). So what is abuse of public power? The term ‘public power’ relates to the exercise of government functions. Their abuse can be imputable to two different perpetrators. The first one is the person who holds public office and exercises government functions. The abuse can be the deed of this public official without anybody else’s participation. The other perpetrator can be a person who seeks to influence by inappropriate means the exercise of government functions that he himself does not have. In this case, corruption is collusive behavior. As a consequence, the abuse of public power comprises both configurations. Private gain in this context is the change of the sound balance between public and private interests (common good) during the decision making process in favor of particular interests. As a consequence, neither the processes nor the outcomes are equitable.

at the expense of the majority of the community, leaving the poor suffering the harshest consequences.¹¹

In practice, inequalities in power and the effectiveness of legal institutions have a two-way causal relationship. Political and economic elite may establish, maintain, subvert or ignore weak institutions to protect their power base - either by excluding other groups or actively discriminating against them.¹² In turn, weak institutions are open to corruption or elite capture. Weak institutions are open to two contrasting forms of elite capture - capture by political elites across different arms of government, or capture by economic elites, typically called 'state capture'. Courts controlled by political interests tend to serve - rather than curb - abuses of state power. Elite capture can influence both the laws themselves and the processes of adjudication or enforcement.¹³ In many cases these different types of elite capture operate simultaneously through partnerships or the combined interests of particular groups in the community.

Glaeser, Scheinkman and Shleifer (2002) argue that structures of inequality enable the rich to subvert public sector institutions, including courts, for their own benefit.¹⁴ For example, relative resources clearly matter if there is any scope for private action to influence judicial decisions. If courts are subverted, there is also less reason to respect the property rights of others in the first place, since the politically strong expect to prevail in any court case brought against them. As a consequence, the initially well situated may pursue socially harmful acts that increase their personal interests, recognizing that the legal, political, and regulatory systems will not hold them accountable.¹⁵ In turn, this breakdown in property rights deters investment by all but a small group of elites.¹⁶ Existing inequalities are thus reinforced in the process; thus the causal link between inequality and injustice runs in both directions, with inequality shaping subversion of institutions while weak or subverted institutions allow only those who are able to protect their investment to become rich.¹⁷ Similarly, Hellman and Kaufmann (2002) argue that

¹¹ The poor, as well as small businesses, suffer most from paying the extra costs for having access to public services, which are associated with bribery, fraud, and the misappropriation of economic privileges. This is why corruption is sometimes compared to a regressive tax, which disproportionately affects small businesses and the poor. For example, Kaufmann's (2001) discussion of bribes in Peru; the bribes paid do not only amount to a higher percentage of the poor's income, but the average bribe payment in absolute amounts is also higher among the poor than among the rich. The poor are also most reliant on the provision of public services. However, corruption reduces the effectiveness of public administration and distorts public expenditure decisions, channeling urgently needed resources away from sectors such as health and education to corruption-prone sectors or personal enrichment. See discussion at <http://www1.worldbank.org/publicsector/anticorrupt/topic1.htm>.

¹² The absence of effective sanctions may also mean that those in positions of power pursue socially harmful acts that are in their self-interest. See Glaeser, Scheinkman, and Shleifer (2002) for a discussion of the causal relationship between inequality and injustice.

¹³ Glaeser, Scheinkman, and Shleifer (2002).

¹⁴ Glaeser, Scheinkman and Shleifer (2002) base their analysis of capture on Russia's transition process, comparing it to the American experience during the Gilded Age.

¹⁵ *Id.*, 3.

¹⁶ The authors find cross-country evidence that the adverse effect of inequality on growth is especially pronounced in countries with weak legal regimes.

¹⁷ Glaeser, Scheinkman & Shleifer (2002), 20.

'inequalities of influence' generate a self-reinforcing dynamic in which subverted institutions further strengthen the underlying political and economic inequalities.¹⁸

According to Glaeser, Scheinkman and Shleifer (2002), this process of perpetuating and increasing inequality entails two different redistribution mechanisms, which they call respectively 'King John redistribution' and 'Robin Hood redistribution'. 'King John redistribution' describes processes whereby the rich and powerful redistribute (take) from the poor by subverting legal, political and regulatory institutions, either by shaping or capturing the legal and political resources, or by resorting to bribes or political contribution. Other economists and political scientists have also demonstrated how political incumbents design inefficient institutions to keep themselves in power. You and Khagram (2005) demonstrate that increasing income inequality provides the wealthy and powerful with both greater motivation and more opportunity to engage in corruption, whereas the poor are more vulnerable to extortion and less able to monitor and hold the rich and powerful accountable. In any event, the property rights of the non-rich, including small businesses, are rendered insecure, which holds back their investment.¹⁹ This means, not only that institutions function in an inequitable way, but also that these inequities form an impediment to economic growth.²⁰

'Robin Hood redistribution' is used to describe instances where the poor and marginalized resort to violence, the political process or other means to redistribute from the rich. This is detrimental to encouraging or enhancing investment given the resulting social and political insecurity, and in particular the insecurity of property rights.²¹

A combination of both the 'Robin Hood' and the 'King John redistribution' mechanism is frequently observed in developing countries. Inequality and other factors such as ethnic rivalries lead to polarization of interests. Unfortunately, these divisions often lead to political unrest, crime²² and violence - and in the extreme - civil war. In these more extreme examples, 'King John' may be replaced by 'Robin Hood', who in turn quickly becomes 'King John II' as those who previously suffered from the *ancien régime* begin to dominate the institutions and capture the state themselves. The authors argue that a strong middle class, which can mobilize to demand more equitable governance, is only likely to develop when strong institutions protect it from the powerful.²³

Using historical evidence from the Gilded Age in the United States (1865-1900), Glaeser, Scheinkman and Shleifer (2002) illustrate how wealth inequality fueled the subversion of both justice and other institutions. For example, the powerful firms of the American transport industry bribed public officials, politicians and judges to obtain large quantities of public land. Similar evidence is found in reforms of the transition of economies of Central and Eastern Europe and the former Soviet Union from socialism to capitalism in the 1990s - what Hellman (1998) calls the 'winner takes it all' reforms. Glaeser,

¹⁸ Hellman and Kaufmann (2002), 1.

¹⁹ Glaeser, Scheinkman and Shleifer (2002), 3.

²⁰ DeLong, & Shleifer (1993); Knack and Keefer (1995).

²¹ Perotti (1993).

²² Economic literature has shown that countries with higher inequality suffer from more violent crime. See, for example, Fajnzylber, Lederman & Lloayza (2002).

²³ Glaeser, Scheinkman and Shleifer (2002).

Scheinkman and Shleifer (2002) demonstrate how crony bias in Russia in the 1990s lead to a complete breakdown of legal institutions and the subversion of other political institutions such as parliament. Similarly, Hellman and Kauffmann (2002) trace the rise of oligarchs in transition countries, who managed to manipulate politicians and shape institutions to advance their own privilege and extract rents from the state at the expense of the social interest. The unbridled capture of economic gains in these countries also led to a substantial breakdown in law and order.

Another striking example of the effects of systemic elite capture is provided by Haber's (2001) account of almost a century of Banking in Mexico. Haber argues that deals between political and economic elite led to the establishment of banking monopolies, with banks rent sharing with governments. He argues that unconstrained by institutionalized checks and balances, governments may structure economic institutions to maximize short-run revenues and/or permit rent seeking by entrepreneurs and public officials.²⁴

Justice sector institutions are arguably particularly prone to corruption, undermining not only the institutions themselves, but their ability to hold other institutions accountable. In his report on a mission conducted in Mexico in 2001, Dato'Param Cumaraswamy, the special UN rapporteur for the independence of judges and attorneys, estimated that corruption affects 50 to 70 percent of federal judges and that the Council of the Federal Judiciary has never punished a judge for corruption.²⁵ In an attempt to curb such systemic corruption, Kenya removed almost a third of judicial staff for corruption in 2004, leaving themselves without an adequately staff judiciary. For the most part, judiciaries are monopolies; they have a large amount of discretion in their decision-making authority; and they have low levels of transparency. Judiciaries that are corrupt or corruptible are not suited to the task of rooting out corruption in other government institutions.²⁶

While many of the practices outlined above may seem like deviation to many western readers, in many developing countries the idealized version of a ‘rule of law’ system has never existed, there is no tradition of checks and balances of state power and thus, these are not part of common understandings, culture or norms. For example, in Ethiopia an independent judiciary was established for the first time in the country’s history in 1995.²⁷ Similarly, before the establishment of administrative courts in 2001, Thai citizens had almost no recourse to challenge actions of public authorities - even if they were patently illegal or corrupt. A petition council had limited power to consider the acts of a public authority, and the enforcement of decisions remained with the prime minister. As a consequence, acceptance among the citizenry was very low.²⁸

In countries such as Mongolia, where the rule of law has been used as an instrument of control and political abuse for decades, disadvantaged people often consider social rights as political gifts rather than legal entitlements. In China, a culture of interference in the courts is understood by many in terms of “leadership” or “supervision”. Fu describes a

²⁴ Haber (2001).

²⁵ Discussed in Jensen and Heller (2003), 283.

²⁶ Jensen (2003), 336-381, at 374.

²⁷ The *Constitution of the Federal Democratic Republic of Ethiopia* 1995.

²⁸ Asian Development Bank (2003), 78.

process of institutionalized political intervention whereby the CCP²⁹ and the government – at the national and local level – direct the verdicts in cases of national or local importance. The most popular form of interference is a written order to the court, instructing the court to adjudicate a case in a particular way. In cases where the CCP or the government want their interference off the record, they use both telephone or an in-person meetings to relay instructions or ask for a progress report on the court's handling of a particular case.³⁰ Politically, the judiciary in China is no different from the police or the prisons: the courts are an instrument of the Party and the state. The courts in China serve the interests of the CCP and respond to its demands.³¹

Similar practices exist in numerous other countries, such as Vietnam, where ‘telephone justice’, whereby the party elites contact the judges to direct the outcome of a case is apparently common.³² Golub (2001) argues that the Philippine legal system is best understood not as a set of institutions and processes, but as a network of personal connections affecting and often dictating its operations. The government enforces many laws only to the extent that private parties press for such action, whether overtly, informally, or corruptly. Government services are gained via personal connections: family, friends, landlords, moneylenders, politicians, or other local power brokers. Where these sources of influence are not available or do not suffice, bribery is an alternative for those with adequate resources.³³ Given these accepted structures, such interference is arguably seen as legitimate and such institutionalized arrangements are indeed the norm.

Interestingly, Fu argues that in the case of China, a shift toward a more market-based economy has not reduced patterns of interference, but rather changed their form, with political connections being exchanged for economic interactions. Lawyers in particular have become instrumental in brokering economic deals and facilitating transactions between litigants and judges. Lawyers are repeat players in the system, and they tend to have stable and close relationships with a select number of judges. With the participation of lawyers, corruption has become normalized and institutionalized; and has become less visible. Fu argues, however, that the participation of lawyers has lead to a “democratization of corruption”. Litigants who do not have their own connections to judges can rely on the services of lawyers to bribe or influence judges and others with political power. By using a lawyer as facilitator, any client with money can ship in the “marketplace of justice”.³⁴ At the same time, such actions are only open to those with resources.

More importantly, Fu argues that bribery and corruption may in fact lead to less injustice in the Chinese criminal justice system, criticized for its harsh penalties and lack of due process. He argues that defendants would be crushed by the system – which offers little protection – if they were not able to soften its effects by using connections or money. In a sense, connections and bribery become substitutes for laws in the protection of

²⁹ The Communist Party of China.

³⁰ Fu (2003), 205.

³¹ Fu (2003).

³² Dung (2003), 8.

³³ Golub (2000).

³⁴ *Id.*

defendants' rights.³⁵ This is a clear example where compartmentalized reforms may in fact lead to great injustice; policy reforms which focus on corruption that do not take into account the broader system may reduce protections available to defendants if alternative protections are not also targeted.

Rules and Practices that perpetuate Discrimination

Unequal power relations may be perpetuated through laws and practices that reinforce discriminatory attitudes and exclusionary practices embedded in norm-based institutions. In some countries laws discriminate against particular groups, as with many laws addressing indigenous peoples or the laws pertaining to 'black' or 'colored' people in apartheid South Africa. In some cases, laws reinforce unequal power relations by their absence - as for domestic violence, often relegated to the non-legal private realm.

Legalized discrimination against women has increasingly attracted international concern. Ten years ago at the United Nations Fourth World Conference on Women, governments, reaffirming their commitment to the equal rights and inherent dignity of men and women, pledged in the Beijing Declaration and Platform for Action to "revoke any remaining laws that discriminate on the basis of sex and remove gender bias in the administration of justice."³⁶ In 2000, the governments that came together at the Special Session of the General Assembly to review and assess progress, recognized that discriminatory legislation and harmful traditional practices continue to undermine women's equality and to further perpetuate *de facto* discrimination.³⁷ According to Equality Now, only thirteen of the forty-five countries highlighted in its 1999 report have successfully revoked discriminatory provisions against women.³⁸ Despite significant legal revisions in some countries, in others, laws that explicitly perpetuate gender inequality with regard to personal status, marital status and economic opportunities remain largely in force.³⁹

Some marital status laws explicitly restrict the rights of women to marry and divorce while allowing such practices as polygamy for men⁴⁰. The Civil Code of Egypt provides that women can not enter into marriage without the permission of a male guardian and unlike men, who have the unilateral and unconditional right to divorce without resort to legal proceedings, can only divorce by a court action and must undergo compulsory mediation.⁴¹ Until 2000, Egyptian women could only file for a fault-based divorce. Now they can also petition for a no-fault divorce, but in order to be granted such, they must sign away their right to alimony as well as repay back the dowry given to them by their

³⁵ *Id.*, 212.

³⁶ Beijing Declaration and Platform for Action (1995).

³⁷ United Nations A/RES/S-23/3.

³⁸ Equality Now (2005).

³⁹ *Id.*

⁴⁰ E.g. the Marriage laws of Algeria, Mali and Tanzania, Senegal and Ghana explicitly recognize the right of men to marry more than one wife. See Equality Now (2005) and COHRE (2004).

⁴¹ Human Rights Watch (2004).

husbands upon marriage. Further, despite their legal entitlement to divorce, in practice judges often continue to deny such rights.⁴²

Other marital laws institutionalize the inferior status of women in both private and public realms and place them under the guardianship of male family members.⁴³ Sudan's Muslim Personal Law Act provides that a husband needs "to be taken care of and amicably obeyed" by his wife. Yemen's Personal Status Act stipulates that a man has a right "to his wife's obedience in matters affecting the family's interests." Particularly, a wife "must obey his orders", "must permit him to have illicit intercourse with him" and "must not leave the conjugal home without his permission." Similarly, according to Algeria's Family Code the wife is required to "recognize her husband and recognize his position as the head of the family." Some family relations laws in Sub-Saharan Africa explicitly confer 'marital power' upon the husband, which often includes the right to administer over the joint matrimonial property.⁴⁴ Thus, married women are regarded as minors, often deprived of the legal capacity to conclude contracts or represent themselves in civil proceedings. For example, the Zimbabwe Deeds Registry Act provides that a woman shall be assisted by her husband "when executing any deed or document required to be so registered."⁴⁵ Similarly, Chile's Civil Code renders that the joint property as well as the property of the wife are to be administered by the husband.⁴⁶

While most succession laws in Sub-Saharan Africa do recognize the rights of women to inherit from their husbands and fathers, such rights in some cases are not equal to those of men.⁴⁷ In Nigeria, Kenya and Uganda, the spouse continues to occupy the house and cultivate the land upon the death of the other spouse. While such interest remains absolute for the husband, for the surviving wife it is valid only until she remarries, at which point the property is transferred to the deceased heirs. In Nepal, until 2002, daughters were only entitled to a share of family property if they were at least 35 years old and unmarried. While recent legal reforms have succeeded in granting equal share of inherited property to male and female descendants, the amended law remained discriminatory as it still requires women to return such property upon marriage.⁴⁸

Several personal status laws also discriminate on the basis of sex, ranging from the denial of women's suffrage in Kuwait to the prohibition against women's driving in Saudi Arabia.⁴⁹ In some countries, women cannot pass their nationality to their children or foreign spouses.⁵⁰ The Citizenship Order of Bangladesh provides that a citizen of Bangladesh is considered everyone, "who or whose father or grandfather was born in the territories now comprised in Bangladesh and continues to be resident." Similarly, a

⁴² *Id.*

⁴³ Equality Now (2005).

⁴⁴ COHRE (2004).

⁴⁵ *Id.*

⁴⁶ COHRE (2004).

⁴⁷ UN-Habitat (2002); COHRE (2004).

⁴⁸ Equality Now (2005).

⁴⁹ *Id.*

⁵⁰ *Id.*

person born outside Kenya becomes a citizen at the day of his birth, “if at this date his father is a citizen of Kenya.”⁵¹

Existing social and economic disparities may also be perpetuated by governments’ failure to enact legislations that recognize and protect the rights of vulnerable groups such as minorities, women, children, disabled persons, homosexuals and people living with HIV/AIDS. For example, the need of sound legislative frameworks that protect orphans and children made vulnerable by HIV/AIDS and ensures full and equal protection of their rights has been widely recognized.⁵² Protection of indigenous peoples’ rights is another key area where inadequate or non-existent legal frameworks can perpetuate inequalities. Nepal, for example, does recognize the existence of some indigenous peoples, but does not grant them rights on this basis.⁵³ A recent case study on eight Central African countries⁵⁴ carried out by the International Alliance of Indigenous and Tribal Peoples of Tropical Forests observed that, with the exception of Uganda, indigenous peoples’ rights over their collective and customary lands are not protected in national land legislation.⁵⁵

Some countries fail to protect vulnerable groups from acts of oppression or violence. The Nigerian Penal Code notes that an assault “by a husband for the purpose of correcting his wife” does not constitute an offence as long as it “does not amount to the infliction of grievous hurt.”⁵⁶ Criminal legislations in India, Malaysia and Tonga, explicitly exclude marital rape from the list of punishable delinquencies.⁵⁷ In some countries, men are also exempted from rape prosecution if they subsequently enter in a legitimate marriage with their victim as it is the case in Guatemala, Lebanon and Uruguay.⁵⁸ In addition, honor killings of wives (when caught in committing adultery) are also known to be pardoned from punishment in Haiti and Syria.⁵⁹ Until recently, Morocco’s Penal Code provided that “murder, injury and beating are excusable if they are committed by a husband on his wife” when caught in adultery. While a recent amendment succeeds in eliminating explicit discrimination against women by making the provision gender neutral, it provides for such discrimination to be continued *de facto*, having in mind that virtually all such killings are effectuated by men.

The existence of “equitable laws” does not guarantee their equitable implementation or enforcement. As outlined above, legal institutions are often subverted in ways that perpetuate inequalities. The cycle between inequality, discrimination, crime and violence and victimization serves as a good example of such a process. A considerable amount of

⁵¹ Section 90 of the Constitution of Kenya.

⁵² Meisling & Puymbroeck (2005).

⁵³ Newing (2004).

⁵⁴ These countries are Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo (DRC), Gabon, Rwanda and Uganda.

⁵⁵ Jackson (2004).

⁵⁶ Equality Now (2005).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

evidence suggests that higher levels of inequality are associated with higher crime rates.⁶⁰ Crime also has unequal impacts. Marginalized groups are more likely to move into criminal behavior, given their limited opportunity sets and their exclusion from economic and political life, and are more likely to be victims of crime. At the same time, discriminatory practices within the police and justice sector mean that these groups are more likely to experience the controlling law-and-order side of the law. Similarly, marginalized groups are less likely to have access to the institutions charged with protecting them. Trapped in a vicious cycle, ethnic and racial minorities, as well as other vulnerable groups, are often subjected to criminalization and victimization by the very institutions charged with their protection.

It is argued that entrenched assumptions about the criminal proclivity of racial and ethnic minorities may result in disproportionate treatment of their members by law enforcement agents.⁶¹ Such practice is widely known as a ‘racial profiling’, and has consistently raised as a concern in developed as well as developing countries. According to a number of statistical surveys, racial profiling directly affects Native, African, Asian, Arab and Hispano Americans and many immigrants in almost every context of their lives – while walking, while driving, while at home, while shopping or while passing through airports.⁶² The European Commission against Racism and Intolerance (ECRI) has expressed concern about sustained patterns of racial profiling in several European states, including Austria, Romania, Spain, Switzerland, United Kingdom and Ukraine.⁶³ In Romania, the European Roma Rights Center (ERRC) has documented violent raids conducted at night by police officers against Roma population without any warrant or reasonable explanation by the competent authorities.⁶⁴ Such raids against Roma people in Romania appear to be a routine activity, accompanied by accusations of illegal activities or illegal domicile and often resulting in imposition of fines and arbitrary arrests.

Evidence also suggests that ethnic and racial groups are more often victims of police brutality during the course of investigation, arrest and detention. Several reports have documented higher rates of mistreatment by police during investigation and in custody against Roma people than against ethnic Bulgarians.⁶⁵ Similarly, in Ukraine, Romas, persons from the Caucus along with immigrants and asylum seekers from Africa or Central and Eastern Asia, have been reportedly more vulnerable to arbitrary arrest and humiliating treatment by the police than ethnic Ukrainians.⁶⁶ According to ECRI, members of religious minorities in Georgia have been allegedly exposed to a higher risk of assaults by law enforcement agents than ordinary citizens.⁶⁷ In a number of decisions,

⁶⁰ Demombynes and Özler (2005); Fajnzylber, Lederman and Loayza (2000).

⁶¹ See e.g., Amnesty International (2004); Ramirez, Hoopes and Quinlan (2003); Harris (1999).

⁶² See e.g., Amnesty International (2004); Ramirez, Hoopes and Quinlan (2003); Harris (1999).

⁶³ See ECRI Country Reports.

⁶⁴ European Roma Rights Center (1996).

⁶⁵ ERRC (1997); Bulgarian Helsinki Committee (2003).

⁶⁶ ECRI (2003).

⁶⁷ ECRI (2002).

the European Court of Human Rights has ruled in favor of ethnic minorities who have based their claims on incidents of disproportionate treatment by the police.⁶⁸

According to Amnesty International, in Mauritius, half of the deaths that occurred in custody in suspicious circumstances between 1979 and 2001 were members of the Creole minority, which constitutes less than 25 % of the entire population.⁶⁹ A recent report on Brazil's human rights situation reported that assaults on black men from impoverished areas by law enforcement officers were five times more than the ones launched against white Brazilians.⁷⁰ Human Rights Watch has noted that Russia, Tajikistan, and Uzbekistan have been reportedly engaged in a campaign of arrests, brutality, and harassment against orthodox or so-called "fundamentalist" Muslims.⁷¹ A ERRC report on *Roma in Detention in Bulgaria* found that Roma in Bulgarian prisons are more often subjected to physical abuse by prison guards and other officials.⁷² Roma are also much more likely to be accommodated in overcrowded cells than non-Roma and certain cells were found to house fifteen prisoners while originally designed for no more than eight inmates. Roma are also reported to receive less food than others, which often causes malnutrition and disease, further exacerbated by poor sanitary conditions and lack of medical aid.⁷³

Evidence suggests that once incarcerated, women prisoners are likely to experience sexual harassment and abuse by prison guards and correctional staff. Moreover, women appear to be doubly vulnerable to assault if they belong to ethnic or racial minority, generally mistreated and discriminated against by the public and the state.⁷⁴ Amnesty International reports that in Turkey, between mid-1997 and November 2000, 132 women reported to be sexually abused in custody, 45 of which sought help on the basis of rape. Ninety-seven of them were members of the Kurdish minority.⁷⁵ The majority of the perpetrators were found to be police officers (in 98 cases), the rest included gendarmes, soldiers, village guards and in one case prison guards. Women in United States have reportedly been subjected to sexual assault by correctional staff.⁷⁶ In the Philippines, women prisoners allegedly face torture and ill-treatment, including rape or sexual violence.⁷⁷

⁶⁸ See e.g. Nachova v. Bulgaria, Applications nos. 43577/98 and 43579/98), 26 February 2004; Balogh v. Hungary, Application no. 47940/99; 20 July 2004; Tekin v. Turkey (1998) 31 E.H.R.R. 4; Aksoy v. Turkey (1996) 23 E.H.R.R. 553.

⁶⁹ Amnesty International (2001).

⁷⁰ U.S. Department of State (2003).

⁷¹ Human Rights Watch (1999).

⁷² ERRC (1997).

⁷³ In a recent decision the European Court of Human Rights noted that the custodial regime and prison conditions to which the applicants were subjected amounted to inhuman and degrading treatment. The Court also noted evidence of unwarranted delays in providing medical assistance, see G.B. v. Bulgaria, Application no. 42346/9, 11 March 2004

⁷⁴ Id.

⁷⁵ Amnesty International (2001).

⁷⁶ Amnesty International (1999).

⁷⁷ Amnesty International (2001b).

Ethnic and racial minorities are often charged with more serious crimes or receive harsher penalties than others convicted of the same crime. According to Human Rights Watch, the war on drugs in the United States was waged overwhelmingly against black Americans.⁷⁸ Although white drug users are five times more than black, blacks constitute 62.7 percent of all drug offenders admitted to state prison. Black men are sentenced to prison on drug charges at 13.4 times the rate of white men. A study conducted by the ERRC reveals that in Bulgaria once incarcerated, Roma people are at a higher risk of receiving more severe sentences for relatively minor offences.⁷⁹ These findings were also confirmed by the Bulgarian Helsinki Committee on the basis of several surveys conducted between 1999 and 2002.⁸⁰ Likewise, in the Czech Republic, male Romani defendants receive excessively longer sentences than their non-Romani counterparts for identical offences.⁸¹

In India, Dalits are reported to be disproportionately treated when facing criminal charges.⁸² In many occasions, the entire community, including children, is arrested when a Dalit member is charged with a crime. Members belonging to lower castes often receive harsher sentences than those belonging to an upper caste even if they have committed identical offences.⁸³ Thus, members of privileged castes are rarely awarded capital punishment. To illustrate, in Mahatma Ghandi's murder case, only the person, who pulled the trigger was sentenced to death, while the rest accused of conspiracy were given only life imprisonment. All four offenders belonged to the Brahmins caste. In contrast, the person accused in conspiracy to kill Indira Ghandi, was hanged to death despite his absence on the crime scene. He belonged to a lower caste.⁸⁴

Similarly, in Saudi Arabia, for example, although the law explicitly states that the death penalty is applicable alike to all capital offenders, judicial practice tends to discriminate against foreign workers and women. Over the last decade, more than half of those executed were foreign nationals.⁸⁵ Reports in the United States show that the race or ethnic origin of the victim also plays a role in determining the degree of penalty.⁸⁶ Even though only 50 percent of the homicide victims in the US are white, capital punishments cases involving white victim amount to 82 percent.⁸⁷ Thus, members of ethnic and racial groups appear to be less protected by the justice system despite the fact that they are more likely to become victims of crime.

Despite these pervasive discriminatory practices, many countries offer no legal protection to disadvantaged people against discrimination on the part of both private actors and law

⁷⁸ Human Rights Watch (2000).

⁷⁹ ERRC (1997).

⁸⁰ Bulgarian Helsinki Committee (2003).

⁸¹ Bukovská (2001).

⁸² Pax Romana ICMICA (2002).

⁸³ Suresh (2004).

⁸⁴ *Id.*

⁸⁵ Amnesty International (2001a).

⁸⁶ ACLU (2004).

⁸⁷ Human Rights Watch, http://www.hrw.org/campaigns/race/criminal_justice.htm (accessed May 7, 2005).

enforcement officers. In others, legislation that sanctions racially motivated practices in the exercise of justice suffers from imprecision, profundity and/or ineffective enforcement.⁸⁸ In India, for example, police reportedly remained impassive as upper caste mob carried out violent attacks against men, women and children from a Dalit untouchable village.⁸⁹ Human Rights Watch reports that when five Roma people were attacked by skinhead thugs shouting racist slogans in the Czech Republic, the police not only failed to take action to stop the violent assault, but even took part in the skirmish by supporting the perpetrators.⁹⁰ The ECRI have repeatedly condemned systematic failure to provide redress for official violence in countries as Bulgaria, Finland, France, Poland, Romania, Russia, Spain and Ukraine.⁹¹ In Zimbabwe, a number of human rights organizations have documented discriminatory killings of white farm workers by militia associated with the ruling party, where no action has been taken by the police in bringing perpetrators to justice.⁹² In addition, fear of intimidation and retaliation among the most marginalized leaves them without clear prospects of redress. Even when police action is taken, judicial decisions may reflect entrenched social bias. In the well-known Indian case of Bhanwari Devi, who was raped by a man from the Brahmins caste, the judge acquitted the accused under the presumption that an upper caste man would not commit rape on a low caste woman. In another case of rape allegation, brought by a prostitute, the judge rejected the claim stating that because the victim was a prostitute, the evidence that the sexual intercourse was conducted without her consent was suspect.⁹³

A Question of Access

In many developing countries, whether formal justice systems are captured by elite interests or are discriminatory or not, they are more often than not inaccessible to the vast majority of the population. Access is often limited by economic, political, geographic or linguistic factors. Justice systems that are incomprehensible, remote, unaffordable, delayed and unfair, effectively deny legal protection to ordinary people.

State legal systems often lack adequate infrastructure or are so institutionally weak that citizens are unable to physically access them, let alone to claim or enforce their rights. In many countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution. In Sierra Leone about 85 percent of the population falls under customary law. Customary tenure covers 75 percent of land in most African countries, affecting 90 percent of land transactions in Mozambique and Ghana.⁹⁴ Formal institutions are normally located in large cities, thus those living in rural areas or in the periphery of the main cities, often do not have easy access to the tribunals.⁹⁵ Where road infrastructure is poor or transportation is missing, people have to

⁸⁸ Open Society Justice Initiative (2004).

⁸⁹ Human Rights Watch (2000).

⁹⁰ Human Rights Watch (2001).

⁹¹ ECRI Reports.

⁹² Human Rights Watch (2004a)

⁹³ Pal (2004).

⁹⁴ Mamdani (1996).

⁹⁵ Gargarella (2002).

walk sometimes for days in order to reach the nearest district court as it is the case in Ethiopia.⁹⁶ Legal services are also often non-existent in rural areas. In Sierra Leone, a population of approximately five million people boasts only 125 lawyers, 95 percent of whom are based in the capital Freetown.⁹⁷ In Cambodia, only a handful of legal practitioners survived the Khmer Rouge regime and no student graduated from the Cambodian law school between 1975 and 1997.⁹⁸

Lack of awareness or minimal knowledge about the laws and the rights they protect is a major constraint to access to justice even when judicial institutions do exist. Disadvantaged people, who often possess minimal education and low literacy, are unaware that such laws exist or that they might have any relevance to their lives. In Pakistan for example, “the high percentage of illiteracy in the country (55 percent) and the low level of quality of literacy even among those classified as literate, excludes a substantial proportion of the population from even being able to read the laws.”⁹⁹ In some former colonies, as in Pakistan, India, Kenya and the Philippines, not only are laws drafted in English; it is also the official court language, despite its incomprehensibility for the majority of the rural population and its common association with the injustice of colonial oppression. Similarly, in Peru legal proceedings are only held in Spanish, while many peasants normally speak only Quechua and Aymara.¹⁰⁰ The formality and complexity of the legal language and judicial procedures may further exacerbate this problem.

Historical, social and cultural factors also contribute to the problem of “legal poverty”.¹⁰¹ In many societies, entrenched discriminatory attitudes against women and other vulnerable people reinforce a perception of discrimination as a matter of fate among such groups. Being so routinely treated with contempt, excluded groups can over time subscribe to social norms and subservient behaviors, which diminish their capacity to aspire and learn about their respective rights.¹⁰² This is particularly evident in most countries in Sub-Saharan Africa, where the laws governing inheritance rights now serve to protect women’s rights, yet an overwhelming number of rural women are either not aware of their rights or do not claim them.¹⁰³

In many countries the cost of legal proceedings precludes most citizens from accessing the court system. For example, in Brazil, processing costs for labor disputes are reported to be ten times higher than the value of the case.¹⁰⁴ The cost of litigation proceedings is often compounded by the requirement that parties be represented by lawyers. In Ecuador, as in most Latin American countries, *pro se* representation is not permitted regardless of whether parties can afford legal services. In Honduras, legal fees to obtain a monthly alimony of 100 *lempiras* in a child support case could amount to as much as 2000

⁹⁶ World Bank (2004).

⁹⁷ Estimates as of November 2003. See James-Allen (2004).

⁹⁸ World Bank (2005).

⁹⁹ Asian Development Bank (2001).

¹⁰⁰ Faundez (2005).

¹⁰¹ Cappelletti (1999).

¹⁰² Appadurai (2004).

¹⁰³ COHRE (2004).

¹⁰⁴ LCSPS Judicial Reform Strategy (2005).

lempiras – the equivalent of almost two years of alimony. This effectively denies access to justice on the basis of economic status.

Although some countries have legal aid systems or public defenders offices administered by bar associations or governments, they often have severely limited personnel, funding constraints or operational difficulties. Legal Aid organizations are generally based in bigger cities and rarely have offices in rural provinces. For example, in Sierra Leone, the single legal aid organization in the country, the Lawyers Center for Legal Assistance, serves only Freetown and the city of Makeni.¹⁰⁵ In Ecuador, as of 2002 there were only thirty-four public defenders for the whole country. The three and a half million population in Quito and Guayaquil was served only by four public defenders.

A report on the status of access to justice in nine countries in Central and Eastern Europe revealed that legal aid systems in these countries are flawed with inconsistencies.¹⁰⁶ The report found that indigent defendants in criminal proceedings are often interrogated, charged, tried and convicted without being represented by a lawyer, despite their constitutionally guaranteed right to a counsel.¹⁰⁷ Similarly, results from a review of about 2000 criminal cases conducted in 2001-2002 in Bulgaria found that in 68 percent of cases, defendants did not have lawyers in the pretrial phase, in 48 percent of the cases, defendants did not have representation in court, and close to one-third of the defendants, who eventually received prison terms, were not represented by an attorney at any stage.¹⁰⁸ In a similar survey conducted in Poland in 2000, out of 290, 000 criminal defendants tried in district courts, 240, 000 were convicted, and at least half of them did not receive lawyer's assistance.¹⁰⁹

Inordinate delays in court processes- due to poor infrastructure, inadequate logistics, and insufficient number of judicial personnel and excessive backlog of cases- also prevent people from seeking judicial redress. For example, it is reported that court proceedings in Yugoslavia take up from three to four years with additional years for enforcement.¹¹⁰

The reluctance of the poor to litigate in courts is compounded by the common perception that law and justice do not really serve the needs of the poor, but the interests of the rich and powerful. For the most part, vulnerable groups see the law as a “tool which the wealthy and well-connected can use against them.”¹¹¹ Historical forces have also played a role in infiltrating attitudes of distrust and fear of injustice associated with the formal state system. In former authoritarian regimes, where law was used mainly as tool to control citizens rather than as a vehicle to protect their rights, ordinary people still feel deeply detached from the legal institutions historically charged with abusing them.

Given that elite capture and corruption, as well as discriminatory attitudes, and practices, are still widespread, vulnerable groups continue to be reluctant to seek redress or assistance in the formal justice sector. In Peru, rural peasants regard state courts as

¹⁰⁵ James-Allen (2004).

¹⁰⁶ Terzieva (2002).

¹⁰⁷ Goldston (2004).

¹⁰⁸ Kanev & Mitrev (2002).

¹⁰⁹ Bojarski (2002).

¹¹⁰ World Bank (2002)

¹¹¹ Hardoy & Satterthwaite (1989).

unfriendly and even hostile as local community members are normally not represented in the judicial personnel and regard the system as alien to their culture and practices. A survey carried out in Ayacucho affirmed that rural people distrust the formal judicial system and believe that it discriminates against them.¹¹² In the Dominican Republic, despite considerable judicial reform, 53 percent of the population still believes that justice is not served on an equal basis between black and white people.¹¹³ Indigenous communities in Peru, such as Calahuyo, are also reported to view the state justice mechanisms as detriment to their right of self-determination and self-government.¹¹⁴

Conclusion

So what does all this mean for justice sector reform? The prevalence of the pathologies outlined above does highlight the difficulties that reformers face, but more than this it highlights the fact that most countries are so far removed from an ideal ‘rule of law’ system as to question its usefulness as a model of reform. This, in turn, calls into question the technocratic top-down approaches, aimed at filling in (what are seen as) institutional gaps or weaknesses, which do not take into account broader structures of inequality and discrimination. Instead of addressing issues of most significant for the poor, such instrumentalist conceptions of law may in fact help advance the economic and political interests of the elites. For example, enhancing the independence of a predominantly corrupt judiciary is hardly going to increase the checks and balances on abuses of power. Similarly, it makes little sense to invest in building the capacity of the courts, if discriminatory attitudes predetermine the outcome of a judicial trial. Combating these attitudes through initiatives such as judicial training will have little effect if judicial institutions are inaccessible to the vast majority of a countries population.

Reforms that fail to address the principal problems underlying inequitable justice systems may not only have no effect on social and economic conditions, but actually may perpetuate and reinforce existing inequalities. It is interesting to note that some of the most successful initiatives aimed at JSR have focused on building a rights based culture rather than focusing on specific institutional reforms. For example, the Armenian government recently funded a TV show to provide citizens with examples, advice and information on their legal rights under Armenian legislation and in Armenia's courts.¹¹⁵ “My Rights” has arguably raised legal literacy and awareness. Many people in Armenia have no understanding of the legal system and are unaware of the rights afforded to them under the law. In addition, distrust of the courts is widespread. After only 5 or 6 shows,

¹¹² IPAZ (2000).

¹¹³ Thompson (2000).

¹¹⁴ Peña (1998).

¹¹⁵ "My Rights" uses mock trials to depict real-life disputes in Armenian courts. The TV judge is a deputy minister of justice, and the parties are often those in the real dispute. A live studio audience, made up of judges, lawyers, legal officials and others, participates in an on-air discussion once the trial is decided. The selection of topics—such as rental and property disputes, customs issues and family law matters—are intended to be timely and of broad interest to Armenian viewers. The show airs once a week on Armenia's state TV channel.

“My Rights” became the number one show in Armenia, generating immense interest in legal issues and citizens' rights.¹¹⁶

This is not to say that formal justice sector institutions are not in need of reform, or indeed that such reforms should not be pursued. Rather, it highlights that the assumption that legal systems are innately just, and thus purely need to be strengthened - is fundamentally flawed; it indicates that rather than starting from a ‘rule of law’ model from which deviations can be measured and targeted, it may be more helpful – and realistic - to ‘assume anarchy’.¹¹⁷ While political, economic and social rights for disadvantaged people may be introduced with legal reforms, real change is unlikely to occur without attention to broader social dynamics and the effects of reforms on these dynamics. Further, reform processes themselves may be captured if attention is not given to building a civic constituency that can demand a certain level of equity, performance and accountability.

¹¹⁶ There have been numerous news reports of viewers requesting legal documents and decisions from notaries, judges and other legal officials based on what they learned from the show. The show has become so popular that when the power went out in one village a few minutes before “My Rights” was going on the air, the people in the town marched on the mayor's office and accused the local officials of intentionally cutting the power so that people could not watch the show!

¹¹⁷ Rajan 2004.

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